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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

AMERADA HESS CORPORATION and
L. A. STRICKLIN,
Petitioners,

v.

DAVID R. GREEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED^{1/}

Whether in an action removed to a federal district court from state court, an out-of-state defendant has the right in a hearing on the plaintiff's motion to remand to pierce the pleadings to prove that the substantive allegations in the complaint against an in-state defendant are so clearly false as to demonstrate that the defendant was fraudulently joined to defeat diversity jurisdiction.

^{1/} Although not relied upon as a basis for this petition, if certiorari is granted, petitioners will raise the following important question for review: whether Defendant-Appellee-Petitioner L. A. Stricklin, an in-state defendant, has been fraudulently joined to defeat diversity jurisdiction because the complaint of Plaintiff-Appellant-Respondent David Green does not set forth a valid cause of action under Mississippi law against Stricklin.

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OPINION BELOW

The Opinion for the United States Court of Appeals for the Fifth Circuit, dated June 16, 1983, is reported at 707 F.2d 201 (5th Cir. 1983) (See Appendix A).

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the

Fifth Circuit were entered on June 16, 1983 (See Appendices A and E). A Petition for Rehearing and a Suggestion for Rehearing En Banc, timely filed, were denied on August 10, 1983 (See Appendix F). 28 U.S.C. § 1254(1) confers on this Court jurisdiction to review the Judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari.

STATUTES INVOLVED

This case involves the following statutes of the United States: 28 U.S.C. § 1332(a) and (c) and 28 U.S.C. § 1441(a) and (b). These statutes are set forth verbatim below:

**§ 1332. Diversity of citizenship;
amount in controversy;
costs**

- (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between -

- (1) citizens of different States;
- (2) citizens of a State and citizens or subjects of a foreign state;
- (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
- (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

. . .

- (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

§ 1441. Actions removable generally

- (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
- (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

Appellant-Respondent David R. Green ("Green") was an employee of Appellee-Petitioner Amerada Hess Corporation ("Amerada Hess") from January 1, 1972

until July 24, 1975. He did not have a written contract of employment, but was hired for an indefinite period of time. On July 24, 1975, Green was discharged by Amerada Hess. Since his discharge, Green has been in continuous litigation with Amerada Hess, including an action under the Mississippi Workmen's Compensation Act for a 1973 on-the-job injury for which he was awarded certain compensation and an action for an alleged retaliatory discharge due to filing a workmen's compensation claim, which the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirmed as stating no cause of action under Mississippi law. See Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir.), cert. denied, 449 U.S. 952, 66 L.Ed. 2d 216 (1980). (R. 194, 468, 469; Ex. D4, at p. 3).

On November 21, 1980, Green filed the present action in the Circuit Court of Clarke County, Mississippi, against Amerada Hess. This is the fourth lawsuit filed by Green against Amerada Hess since his discharge. (R. 468). Green also joined in this cause as a defendant Appellee-Petitioner L. A. Stricklin ("Stricklin"), who was and is at all times relevant to this lawsuit an officer (vice-president) of Amerada Hess. Stricklin was a resident of Tulsa, Oklahoma during the entire period of Green's employment with and discharge from Amerada Hess and subsequently moved to Jackson, Mississippi, in 1977. (R. 9).

The allegations made by Green against Amerada Hess and Stricklin all relate to the alleged wrongful discharge of Green from employment with Amerada Hess - breach of an employment contract,

conspiracy to discharge Green for filing a workmen's compensation claim, interference with Green's economic advantage by terminating his employment, and intentional infliction of mental suffering on Green by discharging him maliciously. (R. 9).

Amerada Hess, an out-of-state corporation, removed the action to the United States District Court for the Southern District of Mississippi on diversity grounds, alleging that Green was attempting to relitigate in state court by the fraudulent joinder of Stricklin, a Mississippi resident at the time, those issues which were adjudicated against him in the original case. The district court held a hearing on Green's motion to remand, in which Amerada Hess produced four affidavits (Appendices G, H, I and J) and the testimony of Stricklin, while Green produced testimony, affidavits,

deposition evidence and documentary evidence. (R. 249, 277; R. Vol. IV, at pp. 2, 70-75).

The district court held that Stricklin had been fraudulently joined, retained jurisdiction of the lawsuit and dismissed Stricklin from the case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Appendices B and C) Subsequently, upon motion of Amerada Hess, the district court granted summary judgment for Amerada Hess against Green on the grounds that Green's claims against Amerada Hess were barred by res judicata and collateral estoppel.

(Appendix D) See Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir. 1980).

Green subsequently appealed to the Fifth Circuit. (R. 430-434, 481-486, 498).

On June 16, 1983, the Fifth Circuit, relying primarily on B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th

Cir. 1981), first held that it was error for the district court to consider any evidence to determine whether the allegations of the complaint presented any genuine issue of material fact with regard to Stricklin's liability to Green. The Fifth Circuit held that the removing party must prove "that [1] there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court or [2] that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983). According to the Fifth Circuit, under this second prong of the fraudulent joinder test, the removing party may pierce the pleadings only to show that the "jurisdictional facts" are false. The Court stated that this factual

inquiry consists of whether the resident defendant is in fact a resident of the state or whether the resident defendant is fictional and does not really exist.

Id. at 204. See B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549, n. 8; 551, n. 14 (5th Cir. 1981). The Court's interpretation does not permit proof that the substantive allegations of the complaint against the in-state defendant are clearly false. Thus, the Fifth Circuit held that because "Green and Stricklin are Mississippi residents, Green's pleadings of jurisdictional facts are obviously not fraudulent." Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983).

Secondly, the Fifth Circuit found that there was a possibility that a Mississippi court would find that Green's claims against Stricklin are not barred by res judicata and collateral

estoppel. Finally, the Court held that "there is a possibility that a Mississippi court would conclude that Green has set forth [in his complaint] a valid cause of action for mental suffering resulting from Stricklin's wrongful acts." Id. at 209. Thus, the Fifth Circuit concluded that Stricklin was not fraudulently joined and reversed and remanded the action to state court.

REASONS FOR GRANTING THE WRIT

- I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS REGARDING THE RIGHT OF AN OUT-OF-STATE DEFENDANT TO FACTUALLY PROVE FRAUDULENT JOINDER OF AN IN-STATE DEFENDANT FOR THE PURPOSE OF DEFEATING DIVERSITY JURISDICTION.

The decision of the Fifth Circuit in this case effectively forecloses an out-of-state defendant's right to prove that an in-state defendant has been fraudulently joined to defeat diversity

jurisdiction. The Fifth Circuit, stating that it was bound by its decision in B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), held that it was error for the district court to pierce the pleadings to determine whether the allegations of Green's complaint stated any genuine issue of material fact against Stricklin, the in-state defendant, limiting any factual inquiry to "jurisdictional facts," which the Fifth Circuit limited to an inquiry as to whether or not Stricklin was a Mississippi resident. Thus, the Fifth Circuit held that the district court could not consider the conclusive proof presented by Amerada Hess at the remand hearing to the effect that Stricklin was not in a position to have committed any of the acts alleged against him in Green's complaint and was therefore fraudulently joined as a matter of fact to defeat

diversity jurisdiction. This unprecedented restriction by the Fifth Circuit on Amerada Hess' right to prove fraudulent joinder is in direct conflict with decisions of this Court and of other courts of appeals. In fact, petitioners are unaware of any decisions of any other court of appeals which eliminates a district court's right to examine the validity of the allegations against an in-state defendant in determining fraudulent joinder.

- A. Decisions of this Court, the Eighth Circuit and the Tenth Circuit conflict with the Fifth Circuit's ruling in this case.

_____ This Court, in Wecker v. National Enameling and Stamping Co., 204 U.S. 176, 51 L.Ed. 430 (1906), ruled that it is proper for a federal court to pierce the pleadings to determine whether the factual allegations against the in-state

defendant are so clearly false as to constitute fraudulent joinder.

In Wecker, the in-state defendant, a co-employee of the plaintiff, was alleged to be jointly negligent with their out-of-state employer regarding plaintiff's work-related injuries. In the hearing on plaintiff's motion to remand, the district court considered affidavits filed by the defendants which showed that the in-state defendant had no authority over or involvement with the plaintiff's work or injuries and was not in a position to have committed the acts of negligence alleged against him in the complaint. The court also considered a counter-affidavit filed by the plaintiff in an attempt to show that the in-state defendant was at least partially responsible for plaintiff's injuries. "Upon these affidavits the court reached the conclusion that, considered with the

complaint, they showed conclusively an attempt to defeat the jurisdiction of the Federal court by wrongfully joining Wettengel [the in-state defendant]."

Id. at 184, 51 L.Ed. at 435.

This Court affirmed the district court's decision and rejected the plaintiff's argument that the federal courts must look only to the complaint to determine fraudulent joinder. Instead, this Court approved the district court's consideration of affidavit proof in the hearing on plaintiff's motion to remand to determine if the substantive allegations against the in-state defendant were patently false, concluding as follows:

In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for

the purpose of defeating the right of the corporation to remove the case to the Federal court.

Id. at 185, 51 L.Ed. at 435. See Wilson v. Republic Iron and Steel Co., 257 U.S. 92, 96 L.Ed.144, 148 (1921) (If plaintiff "take[s] issue with the statements in the petition for removal", . . . the issues must be heard and determined by the district court").

Like this Court in Wecker, the Eighth and Tenth Circuits have also expressly confirmed the right of an out-of-state defendant to pierce the pleadings in order to factually prove that the in-state defendant has been fraudulently joined to defeat diversity jurisdiction.

The Tenth Circuit has expressly ruled in several decisions that fraudulent joinder may be proved by showing that "in fact no cause of action exists" against the in-state defendant.

Smoot v. Chicago, Rock Island and Pacific Railroad Co., 378 F.2d 879, 882 (10th Cir. 1967). In Smoot, the Tenth Circuit considered a wrongful death action against an out-of-state railroad corporation and its alleged in-state employee. On the motion to remand, the railroad supported its position that the in-state defendant was fraudulently joined by producing the employee's affidavit "to the effect that his employment with the railroad had terminated almost fifteen months before the collision and that he was in no way connected with the acts of negligence abscribed to him." Id. at 881. The Tenth Circuit rejected the plaintiff's argument that since "the allegations of the complaint were adequate to state a cause of action against" the in-state defendant, there was no fraudulent joinder. Id. The Court held that the evidence produced by the defendants at

the remand hearing established conclusively that the in-state defendant was not a railroad employee at the time of the collision which formed the basis of the plaintiff's negligence cause of action and thus was properly held to have been fraudulently joined.

Similarly, in McLeod v. Cities Service Gas Co., 233 F.2d 242 (10th Cir. 1956), the Tenth Circuit ruled that an in-state defendant was fraudulently joined since "[o]n a hearing on the [remand] motion, there was positive and uncontradicted proof to the effect that [the in-state defendant] had nothing whatsoever to do with the alleged negligent clean-up operations conducted by Cities Service on appellants' land in 1952." Id. at 246. Accord Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1964) (affirmed finding of fraudulent joinder, noting that "trial

court had the power to compel appellant to disclose his evidence affecting [the in-state defendant's] liability"); Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 409 (10th Cir. 1958) (affirmed fraudulent joinder decision due to "uncontradicted evidence in the affidavits of [the in-state] defendants that they had nothing to do with the assembly and sale of the bicycle").

The Eighth Circuit has also expressly confirmed the district court's right to factually determine fraudulent joinder. For example, in Polito v. Molasky, 122 F.2d 258 (8th Cir. 1941), the Eighth Circuit approved the evidentiary remand hearing conducted by the district court to determine fraudulent joinder of certain in-state defendants charged with "joint and concurrent negligence," stating at page 261 of the opinion:

The evidence introduced at the hearing showed conclusively that the [in-state defendants] had no connection with the accident out of which the alleged cause of action arose nor with the parties involved in it. They knew nothing about it. It appeared also that plaintiff joined them as defendants through a mistake of fact which might by the exercise of diligence have been discovered. The joinder was so baseless that it was fraudulent as a matter of law.

Only a few years before Polito, the Eighth Circuit had reached a similar result in Leonard v. St. Joseph Lead Co., 75 F.2d 390 (8th Cir. 1935). In Leonard, a negligence action, the Court of Appeals upheld the district court's finding of fraudulent joinder of the in-state defendants. The Court acknowledged that fraudulent joinder may be proved by showing that the complaint states no legal cause of action under the facts alleged in the complaint, but also confirmed that

joinder is also fraudulent if the facts alleged in plaintiff's pleading with reference to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis exists for an honest belief on the part of the plaintiff that there is a joint liability.

Id. at 394.

The Eighth Circuit held in Leonard that the removal petition and the affidavits produced by the removing defendant at the remand hearing established that "the resident defendant[s] had nothing to do with the transaction out of which plaintiff's cause of action arises," while plaintiff's counter-affidavit contained "nothing tangible, definite or convincing" regarding the liability of the in-state defendants, but instead was almost entirely hearsay. Id. at 397.

Thus, this Court, as well as the Eighth and Tenth Circuits, have expressed early on that an out-of-state defendant may prove fraudulent joinder by examining

the factual validity of the allegations against the in-state defendant.

- B. The decision of the Fifth Circuit in this case, following B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), conflicts with and misreads prior decisions of the Fifth Circuit.

The primary reason for the conflict of the Fifth Circuit in this case with the decisions discussed above is the Court's reliance on a prior Fifth Circuit decision, B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981), which was decided several months after the remand hearing in this case. The Fifth Circuit's decision in this case treated B., Inc. as binding with regard to analysis of fraudulent joinder:

This panel is not empowered to overrule the judgment of another panel of this court. B., Inc. is precisely on point. It unequivocally directs the proper analysis in a fraudulent joinder case.

Id. at 206.

In B., Inc., the Fifth Circuit panel set forth the standard for fraudulent joinder which the panel in this case followed:

In order to establish that an in-state defendant has been fraudulently joined, the removing party must show that [1] there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or [2] that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Id. at 549. Through dicta in footnotes, B., Inc. limited any factual proof to that concerning "jurisdiction facts," which the Court restricted to the residency or existence of the in-state defendant. B., Inc. eliminated any inquiry into the validity of the substantive allegations against the in-state defendant; under B., Inc., the substantive allegations may be attacked only by showing that the complaint fails to state a legal cause of action under

state law. Id. at 549, n. 8; 551, n. 14.

In devising its unprecedented restriction on fraudulent joinder, the Fifth Circuit in B., Inc. purported to rely primarily upon the following prior Fifth Circuit decisions: Keating v. Shell Chemical Co., 610 F.2d 328 (5th Cir. 1980); Tedder v. F.M.C. Corp., 590 F.2d 115 (5th Cir. 1979); Bobby Jones Garden Apartments v. Suleski, 391 F.2d 172 (5th Cir. 1968); and Parks v. New York Times Co., 308 F.2d 474 (5th Cir. 1962), cert. denied 376 U.S. 949, 11 L.Ed. 2d 969 (1964). However, an examination of these decisions clearly shows that they do not support the radical interpretation of B., Inc.; instead they are in conformity with the decisions of this Court, the Eighth Circuit and the Tenth Circuit discussed herein regarding factual proof of fraudulent joinder.

For example, in Parks v. New York Times Co., 308 F.2d 474, 477 (5th Cir. 1962), the Fifth Circuit recognized the two-prong test for fraudulent joinder:

[1] The joinder is fraudulent if it is clear that, under the law of the state in which the action is brought, the facts asserted by the plaintiff as the basis for the liability of the resident defendant could not possibly create such liability so that the assertion of the cause of action is as a matter of legal law plainly a sham and frivolous. [2] And a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of plaintiff that there was joint liability. (emphasis added)

The Fifth Circuit reaffirmed the Parks bifurcated "in law" and "in fact" standard in Bobby Jones Garden Apartments, Inc., v. Suleski, 391 F.2d 172, 176 (5th Cir. 1968) and, in fact, pointed out in Bobby Jones that "[t]he doctrine of fraudulent joinder had its inception in

the courts . . . to protect non-resident defendants from any misstatement of fact" Id. (quoting Bentley v. Halliburton Oil Well Cementing Co., 174 F.2d 788, 791 (5th Cir. 1949)) (emphasis added). Thus, rather than being limited to proof of the existence or residency of the in-state defendant, the Fifth Circuit in Parks and Bobby Jones recognized that fraudulent joinder may be proved by an examination of "the facts asserted with respect to the resident defendant."

More recently, the two-prong standard of Parks and Bobby Jones was graphically applied by the Fifth Circuit in Keating v. Shell Chemical Co., 610 F.2d 328 (5th Cir. 1980).^{1/} In Keating, the plaintiff,

^{1/} In Tedder v. F.M.C. Corp., 590 F.2d 115 (5th Cir. 1929), the Fifth Circuit affirmed the district court's ruling of fraudulent joinder on the ground that the complaint did not state a cause of action under state law against the in-state defendant and did not involve the factual prong of the fraudulent joinder test.

a resident of Louisiana, sought damages for personal injuries from his employer, Shell Chemical Company, and four of its officers, all residents of Louisiana. Shell alleged the four officers were fraudulently joined since, by Louisiana statute, they were immunized from liability. The district court and the Fifth Circuit agreed with Shell that the plaintiff's complaint, when tested against applicable Louisiana law, failed to state a cause of action for an intentional tort, one of the exceptions to the statute.

With respect to another statutory exception, factual in its basis and possibly applicable to one officer, the Fifth Circuit did not remand to state court, but remanded to the district court "for a suitable determination of whether [the officer] was acting within the § 1032 scope of his employment at the time of the accident." Id. at 333.

The Fifth Circuit expressly permitted the district court to determine "[b]y summary judgment or otherwise . . . that on facts which are uncontradicted, or impliedly found most favorable to [plaintiff], [whether the officer] could not, as a matter of Louisiana law, be outside the § 1032 course and scope of its employment." Id.

The disposition in Keating of the intentional tort statutory exception was according to the first prong of the Parks disjunctive test: whether a cause of action exists under the law of the state on the cause alleged. The remand of the course and scope of employment issue in Keating, however, was an analysis under the second prong of the Parks test: whether, under a summary judgment standard, a cause of action exists on the facts presented at the hearing on the motion to remand.

Keating, therefore, sanctioned a factual examination of the substantive allegations against the resident defendant under a summary judgment standard.^{2/}

It is evident that in B., Inc., the Fifth Circuit either misread its prior decisions or chose to ignore these prior rulings in an unwarranted effort to limit diversity jurisdiction. It is interesting to note that the conclusion of B., Inc. comments that "[m]any commentators have suggested that diversity is a judicial farce, but for now it remains a judicial fact." B., Inc. v. Miller Brewing Co., 663 F.2d 545, 554 (5th Cir. 1981). Moreover, B., Inc.

^{2/} B., Inc. cited Keating in recognizing that "the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment under Fed. R. Civ. P., Rule 56(b)." B., Inc. v. Miller Brewing Co., 633 F.2d 545, 549, n. 9 (5th Cir. 1981).

quotes the "in law" prong of the fraudulent joinder test from page 478 of the Parks opinion (quoted above on page 25 of this Petition) but curiously omits from the quote the "in fact" prong that immediately follows. Id. at 550.

Furthermore, with regard to Keating, B., Inc. fully discussed the failure of the complaint to state a cause of action for an intentional tort due to the statutory exception under the "in law" prong of fraudulent joinder analysis, but conveniently omitted the discussion of the remand of the scope of employment issue to the federal district court for factual examination under the "in fact" prong of the fraudulent joinder test. Id. at 551, n. 13. Regardless of the intent of the Court in B., Inc., it is obvious that the restrictions on fraudulent joinder analysis initiated by B., Inc. and followed by the Fifth Circuit in this

case present a definite and important conflict with decisions of this Court and other courts of appeals.

- C. Under the proper fraudulent joinder analysis, the allegations against the in-state defendant in this case are so clearly false as to constitute fraudulent joinder.

In this case it is clear that the district court's finding of fraudulent joinder of Stricklin, after a limited evidentiary examination in the remand hearing, was proper and in conformity with the decision of this Court in Wecker, with the decisions of the Eighth and Tenth Circuits and with the Fifth Circuit's decision in Keating. Just as the district court in Polito held that "the evidence introduced at the hearing showed conclusively that the [in-state defendants] had no connection with the accident out of which the alleged civil action arose nor with the parties

involved in it," the district court reached its decision by determining in this case on a threshold basis that L. A. Stricklin had no involvement whatsoever with the discharge of Green, whether that discharge was for cause (as was the case) or was in some way wrongful. The primary evidence presented by Amerada Hess at the fraudulent joinder remand hearing was four strong affidavits by the individuals who were responsible for discharging Green for cause: David M. Pritchard, W. C. Henderson, James C. Hefley and Donald L. Miller. (Appendices G, H, I and J) All clearly stated that Stricklin was not involved in Green's discharge and that Green was discharged by them for cause. (Exh. D1, D2, D3 and D4). These affidavits were augmented by the testimony of Stricklin, who simply reaffirmed his answer in the case - that he had nothing to do with Green whatsoever

and was not even in a position to have committed any of the acts alleged in the complaint.^{3/} Like the affidavits considered by this Court in Wecker, these affidavits and Stricklin's testimony established conclusively that no genuine issue of material fact existed for any claim of liability of Stricklin to Green.

The evidence produced by Amerada Hess at the remand hearing conclusively

^{3/} The fact that Amerada Hess had Stricklin testify in the remand hearing rather than have him submit an affidavit does not change the threshold nature of the fraudulent joinder inquiry. Although affidavits are the primary source of evidence at a summary judgment hearing, to which a fraudulent joinder remand hearing is analogous as B., Inc. and Keating pointed out, a district court has the "discretionary power to hear oral testimony at [a] summary judgment hearing," and thus, at a remand hearing. Walters v. City of Ocean Springs, 626 F.2d 1317, 1322 (5th Cir. 1980); 6 J. Moore, Federal Practice ¶ 56.11[8] (2d ed. 1982).

confirms that as Vice-President of Amerada Hess' U.S. Production Division in Tulsa, Oklahoma, Stricklin had no involvement in hiring and discharging of hourly employees such as Green and other personnel matters. Stricklin was not present or even in the state of Mississippi when Green was discharged and he did not have anything to do with any aspect of the discharge. Stricklin testified that he had no personal knowledge about or contact with Green at all, including Green's work performance, medical history, and workmen's compensation claim and payments, other than a brief after-the-fact conversation with James C. Hefley, Amerada Hess' Southeast Regional Manager, through July 24, 1975 (the date of Green's discharge), and even had to have Green pointed out to him when he entered the courtroom on March 30, 1981. The telephone call from

Hefley was merely a courtesy call intended for George Dewhurst, the Manager of Production, who was in overall charge of day-to-day operations and with whom Stricklin shared a secretary in the Tulsa, Oklahoma office of Amerada Hess. Stricklin received the information that Green was terminated on behalf of Dewhurst and concurred in the handling by Hefley of this decision, for which he had no responsibility. (R. Vol. IV at pp. 38, 39, 46, 47, 48; R. Vol. V, p. 56, and Exh. D3 at p. 1).

In contrast to this conclusive evidence, Green did not present anything of substance, although the district court "bent over backwards" by providing Green more than two months to produce anything that would establish an issue of liability. Like the plaintiff in Leonard, Green produced nothing "tangible, definite or convincing." Leonard v. St. Joseph

Lead Co., 75 F.2d 390, 397 (8th Cir. 1935). Green produced the testimony of his brother, Albert Green, the affidavit of M. L. Davis, and certain documentary evidence, all of which had nothing to do with the case. (R. Vol. V, at p. 8, Exh. P1). Of course, in a remand hearing, like a summary judgment hearing, evidence which presents no real controversion of the case does not affect the court's decision. See Cunningham v. Securities Investment Co. of St. Louis, 281 F.2d 439, 439-440 (5th Cir. 1960).

Green also introduced excerpts of a deposition with Paul Allen and what purported to be an unsigned and undated telephone transcript of a conversation with Don Miller, which the district court admitted "for such weight as the Court wishes to give." (R. Vol. V, at pp. 16, 43). These items included admittedly second and third-hand

inferences that Stricklin wanted Green discharged. (Exh. P2, at pp. 19, 20, 23, 33, 45, 36, 38, 39, 40; Exh. P10, at pp. 1-2). The district court was justified in giving these items of rank hearsay no weight in determining whether a genuine issue of material fact existed. Leonard v. St. Joseph Lead Co., 75 F.2d 390, 397 (8th Cir. 1935) (affidavit consisting almost entirely of hearsay entitled to no weight in remand fraudulent joinder hearing). See, e.g., Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 556 (5th Cir. 1980) (on summary judgment, hearsay evidence "entitled to no weight."); 6 J. Moore, Federal Practice ¶ 56.22[1] (2d ed. 1982).

Finally, Green introduced an interrogatory answer of Amerada Hess from a previous lawsuit which requested the identity of all officers of Amerada Hess who "participated in, agreed to, or

concurred with" the decision to terminate Green's employment. The answer of Amerada Hess to the interrogatory was L. A. Stricklin. (Exh. P9). This answer is confirmation of Stricklin's position - that he was informed after the fact as a matter of courtesy in the absence of George Dewhurst, with whom he shared a secretary in the Tulsa office, that the decision to discharge Green, an hourly employee, had been made by Hefley and his subordinates. As Vice-President, Stricklin was the only officer to have any information about Green's discharge. Dewhurst, Hefley, Henderson, Pritchard and Miller were not officers of Amerada Hess.4/

4/ The district court properly held that Stricklin's limited knowledge of Amerada Hess' alleged torts against Green was insufficient as a matter of law for an officer's liability; personal participation is required. Childers v. Beaver Dam Plantation, Inc., 350 F. Supp. 331, 335 (N.D. Miss. 1973).

Amerada Hess convincingly satisfied the standard for proving fraudulent joinder in fact, demonstrating that there was no genuine issue of material fact as to Stricklin's liability to Green. Green was required to bring forward "significant probative evidence" demonstrating the existence of a triable issue of fact and failed to do so.

First National Bank v. Cities Service Co., 391 U.S. 253, 290, 20 L.Ed. 2d 569, 593 (1968); Union Planters National Leasing, Inc. v. Woods, 687 F.2d 117, 119 (5th Cir. 1982). "The mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the [removing] party." Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). Green failed to demonstrate the existence of a genuine issue of material fact and, therefore,

Stricklin was properly held by the district court to be fraudulently joined in this case.

These conflicts justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION REGARDING THE RIGHT OF AN OUT-OF-STATE DEFENDANT TO INVOKE REMOVAL AND DIVERSITY JURISDICTION BY FACTUALLY PROVING FRAUDULENT JOINDER OF AN IN-STATE DEFENDANT AND THE DECISION IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This case concerns an unwarranted restriction on the removal and diversity jurisdiction of the federal courts. The decision of the Fifth Circuit in this case severely and improperly curtails the right of out-of-state defendants to invoke diversity jurisdiction through removal by virtually eliminating the

concept of fraudulent joinder as a practical matter. The decision prevents an out-of-state defendant from piercing the pleadings in order to prove that the Plaintiff's substantive allegations against an in-state defendant are "so clearly false as to demonstrate that no factual basis exists for an honest belief on the part of the plaintiff that there is a joint liability." Leonard v. St. Joseph Lead Co., 75 F.2d 390, 394 (8th Cir. 1935). The only exception permitted by the Fifth Circuit is factual proof that the alleged in-state defendant is actually a non-resident or is fictional.

The Fifth Circuit's decision puts an out-of-state defendant at the mercy of a plaintiff regarding forum selection and prohibits the out-of-state defendant from securing its right to a federal forum, the importance of which cannot be

overstated. Unless the plaintiff's attorney fails to properly frame the complaint by failing to allege the necessary elements of a legal cause of action, such as negligence, breach of contract, etc., fraudulent joinder of an in-state defendant cannot be proved since the allegations of the complaint against said defendant must be taken as true, regardless of how false the allegations are. In effect, a plaintiff may assert a sham claim against any in-state defendant in state court that satisfies the legal requirements of a state court action with confidence that the case will be remanded, since the out-of-state defendant is prevented from presenting factual proof that the claims against the in-state defendant are without foundation.

A clear illustration of the unfairness of the Fifth Circuit's decision is

its application to the facts of Smoot v. Chicago, Rock Island and Pacific Railroad Co., 378 F.2d 879 (10th Cir. 1967). As stated earlier in this Petition, Smoot involved a claim of joint negligence against an out-of-state railroad corporation and an alleged in-state railroad employee. The complaint alleged that the in-state defendant "at all times concerned herein, was in the employ of the defendant corporation as supervisor in charge of the installation and maintenance of automatic warning and safety signals. . . ." Id. at 881. Under the fraudulent joinder analysis employed by the Fifth Circuit in this case, the district court would be required to accept as true the plaintiff's allegations that the in-state defendant was a railroad employee at the time of plaintiff's collision. The district court would not be allowed

to consider the defendants' proof that the in-state defendant's "employment with the railroad had terminated almost fifteen months before the collision and that he was in no way connected with the acts of negligence ascribed to him," since such proof refutes the substantive allegations of the complaint that must be taken as true. Id. This completely sham joinder of the in-state defendant would unjustly prevent access to federal court as in this case.

The Fifth Circuit stated that the requirement that an attorney sign a pleading, as set forth in Miss. Code Ann. § 11-7-91 (1972) and Miss. R. Civ. Proc. 11, protects out-of-state defendants from fraudulent joinder of in-state co-defendants in state court due to an attorney's ethical commitment to file only good faith actions. Green v. Amerada Hess Corp., 707 F.2d 201, 206 (5th Cir.

1983). This is the Court's only justification for its fraudulent joinder analysis independent of B., Inc.

Based on practical experience, the Petitioners respectfully disagree. First of all, an attorney is not required to sign pleadings; the party himself, who has no ethical restrictions, may sign. More importantly, verification by an attorney affords no protection against frivolous lawsuits. They are filed every day. E.g., Incomo v. Southern Bell Telephone & Telegraph Co., 558 F.2d 751, 753 (5th Cir. 1977). If the Fifth Circuit logic were correct, then there could never be fraudulent joinder, even if the complaint failed to state a legal cause of action against the in-state defendant. Due to the ethical protection of the attorney verification, the good faith of the joinder would have to be presumed. With

all due respect, this policy would be unjust and unrealistic.

An out-of-state defendant's primary tool to combat frivolous lawsuits through fraudulent joinder is the right to demonstrate factually that the substantive allegations of the complaint fail to state a genuine issue of material fact against an in-state defendant in a remand hearing. Only by permitting an out-of-state defendant to make this factual inquiry can there be any practical safeguard against fraudulent joinder and protection of an out-of-state defendant's right to diversity jurisdiction.

Contrary to the apparent conception of the Fifth Circuit in this case and in B., Inc., diversity jurisdiction is an important right to an out-of-state defendant which this Court should vigorously protect, as this Court mandated

in Wecker v. National Enameling and Stamping Co., 204 U.S. 176, 186 51 L.Ed. 430, 436 (1907):

While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in the proper cases, to retain their own jurisdiction.

Diversity jurisdiction was established to provide access to a competent and impartial court, free from local prejudice, for the determination of controversies between citizens of different states. 1 J. Moore, Federal Practice ¶ 0.71 [3.-1] (2d ed. 1982). This policy underlying diversity jurisdiction is still vital today, especially for corporate businesses such as Amerada Hess Corporation that operate in a number

of states. These businesses are too often viewed as "deep pocket" targets for litigation by local citizens, particularly in these depressed economic times.

Some states, such as Mississippi, have not come as far as others in eliminating local prejudice against out-of-state businesses. Concern for the kind of justice that businesses like Amerada Hess Corporation receive in the courts of the state of which their adversary is a citizen is legitimate and very real today, particularly in rural states such as Mississippi. Only in federal courts can an out-of-state litigant feel confident of being afforded a qualified and impartial jury to determine by unanimous vote the legal issues involved, as well as the best available pre-trial and trial procedures and qualified judges with secured tenure

and compensation, who retain their common-law powers to comment on the evidence and control the course of trial. 1 J. Moore, Federal Practice ¶ 0.71[3.-1] (2d ed. 1982). Therefore, the Fifth Circuit's dangerous restriction on the access of an out-of-state defendant to federal diversity jurisdiction through factual proof of fraudulent joinder of an in-state defendant should be closely reviewed by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

AMERADA HESS CORPORATION and
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CERTIFICATE OF SERVICE

I, E. L. BRUNINI, JR., Counsel of Record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of September, 1983, I served copies of the foregoing Petition For A Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

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I further certify that all parties required to be served have been served.



E. L. BRUNINI, JR.